UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MONSANTO COMPANY and
MONSANTO TECHNOLOGY LLC,

Plaintiffs,

v.

E.I. DU PONT DE NEMOURS AND CO. and
PIONEER HI-BRED INTERNATIONAL, INC.,

Defendants.

Case No. 09-cv-0686 (ERW)

EXHIBIT D

December 15, 2010 Letter to
John Rosenthal from Amy Mauser

MEMORANDUM IN SUPPORT OF DEFENDANTS' THIRD MOTION TO COMPEL

BOIES, SCHILLER & FLEXNER LLP

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December 15, 2010

Via E-mail

John J. Rosenthal, Esq.
Winston & Strawn LLP
1700 K Street, N.W.
Washington, D.C., 20006-3817

Re: ***Monsanto Co. and Monsanto Technology LLC v. E.I. du Pont de Nemours & Co. and Pioneer Hi-Bred Int'l, Inc.*, Case No. 09-civ-0686-ERW (E.D. Mo.)**

Dear John:

This letter responds to your request on our call yesterday that we provide you with citations to paragraphs of the Second Amended Answer & Counterclaims ("SAAC") alleging that Monsanto engaged in coercion of germplasm developers such as Syngenta and Dow to switch from Roundup Ready to Roundup Ready 2 Yield. On our phone call, you indicated for the first time that it is Monsanto's position that DuPont's & Pioneer's "switching strategy" is limited to allegations concerning coercion of only independent seed companies ("ISCs") to switch from Roundup Ready to Roundup Ready 2 Yield, and that documents related to Monsanto's efforts to switch Syngenta, Dow, and other germplasm developers to Roundup Ready 2 Yield are therefore not relevant to the allegations in the SAAC. You went so far as to characterize our requests for documents related to germplasm developers as being simply a "fishing expedition." Monsanto's position is baseless, as the references to case pleadings and discovery negotiations we provide below demonstrate.

The SAAC contains numerous allegations that Monsanto used license restrictions and other forms of coercion to induce germplasm developers, including Syngenta and Dow, to switch from Roundup Ready to Roundup Ready 2 Yield. Indeed, one of the primary reasons DuPont & Pioneer had for seeking leave to amend the counterclaims was to "account for the full scope of conduct Monsanto has undertaken to maintain its ill-gotten monopoly power." (Memorandum in Support of Defendants' Motion for Leave to File Second Amended Answer and Complaint ("Br. to Amend") at 5, Dkt. # 170.) Accordingly, in support of their motion for leave to amend their counterclaims, DuPont & Pioneer explained they sought to amend the counterclaims to "articulat[e] the role of germplasm developers and Monsanto's treatment of them in its strategy to switch the industry to its new product" and to "explain how Monsanto has coerced germplasm developers to switch to licensing germplasm with the Roundup Ready® 2 Yield trait and conditioned such licenses on their ending active Roundup Ready® breeding programs, the continuation of which are necessary for a viable generic version of the trait to emerge after patent expiration." (*Id.* at 5-6.) In the face of this clear statement of the purpose of filing the SAAC, Monsanto's current position that the allegations are limited to its treatment of ISCs is baseless.

Nevertheless, we provide here a representative selection of allegations from the SAAC regarding the role of germplasm developers and Monsanto's treatment of them in Monsanto's switching strategy. To begin with, DuPont & Pioneer identified by name many of the germplasm developers, including Syngenta and Dow, in Paragraph 69 of the SAAC:

Paragraph 69: Besides Monsanto, there are also only a few firms that invest significantly in the development of germplasm, the base genetic material for plants. In soybeans, the principal developers of germplasm are Midwest Oilseeds/Harry Stine, **Dairyland (a Dow subsidiary)**, **Syngenta**, and Pioneer. In corn, the primary germplasm developers are Holden's Foundation Seeds (a subsidiary of Monsanto), Pioneer, **Syngenta** and **Mycogen (a Dow subsidiary)**.

In addition, DuPont & Pioneer clearly described how such germplasm developers fit, along with ISCs, into Monsanto's overall scheme to monopolize. For example, the SAAC alleges:

Paragraph 2: DuPont and Pioneer bring this action to arrest a new anticompetitive campaign by Monsanto designed to force ISCs and **germplasm developers** to switch from the Roundup Ready® platform trait to a new, non-innovative platform trait called Roundup Ready® 2 Yield before the patent Monsanto asserts to cover Roundup Ready® expires, thereby allowing it to create a bridge from an expiring patent monopoly to a patent monopoly of longer duration, impede generic entry, and extend its monopoly power into developing markets involving combinations ("stacks") of input traits that confer multiple or more effective forms of herbicide tolerance or insect resistance or stacks of input and output traits that confer valuable end-use qualities.

Paragraph 5: Monsanto's anticompetitive motivation for this exclusionary conduct is evident. The stacked, better yielding, OGAT/RR product is a direct threat to Monsanto's attempt to extend its glyphosate-tolerant trait monopoly into the distant future by moving independent seed companies ("ISCs"), **germplasm developers**, and farmers from the original Roundup Ready® soybeans to the next generation – Roundup Ready® 2 Yield.

Paragraph 10: Monsanto told **germplasm developers** that, as a condition to obtaining a license to develop germplasm with the Roundup Ready® 2 Yield trait and to out-license such germplasm to ISCs, they would be required to stop breeding with Roundup Ready®, which effectively disables all other **germplasm developers** from producing a competitive generic Roundup Ready® product in 2014, when Monsanto contends its patent covering Roundup Ready® expires. On information and belief, in response to Monsanto's licensing terms, many ISCs and **germplasm developers** have converted, or are in the process of converting, from Roundup Ready® to Roundup Ready® 2 Yield, and are, or shortly will be, for practical purposes, committed to the switch. On information and belief, Monsanto is also using payments, penalties and incentives to induce ISCs and **germplasm developers** (and ultimately farmers) to switch from Roundup Ready® to Roundup Ready® 2 Yield. By switching ISCs and **germplasm developers** to the Roundup Ready® 2 Yield trait, Monsanto seeks to remove the Roundup Ready® trait from the market prior to the time when competitors – including ISCs and Pioneer – will be able to market a generic product, thereby creating a bridge between its Roundup Ready® patent monopoly and its Roundup Ready® 2 Yield patent monopoly of longer duration.

Paragraph 12: Monsanto's purported new policy comes too late to address the economic reality that its policies created. On information and belief, Monsanto has already succeeded in effectively converting many ISCs and most **germplasm developers** to Roundup Ready® 2 Yield. Monsanto has not converted Pioneer to Roundup Ready® 2 Yield, but Monsanto prohibits Pioneer from out-licensing Roundup Ready® germplasm to ISCs. Without an alternative source of Roundup Ready® germplasm, ISCs will have no choice but to switch to Roundup Ready® 2 Yield, and no ability to change course and switch back, as Monsanto and other **germplasm developers** phase out Roundup Ready® from the germplasm they license to other seed companies.

Paragraph 75: Monsanto has begun an aggressive campaign to switch farmers from Roundup Ready® to Roundup Ready® 2 Yield soybeans. For example, in 2008, Monsanto began an aggressive campaign to convert from Roundup Ready® to Roundup Ready® 2 Yield. As ISCs committed to switching to Roundup Ready® 2 Yield, **germplasm developers**, which license their

> germplasm to ISCs, had no choice but to incorporate Roundup Ready® 2 Yield into the germplasm they develop for out-licensing to ISCs. On information and belief, Monsanto conditioned the right of **germplasm developers** to license germplasm containing the Roundup Ready® 2 Yield trait on the **germplasm developers** stopping their breeding programs for Roundup Ready®.

The SAAC contains many other allegations concerning germplasm developers and Monsanto's treatment of them as it carried out its switching strategy. DuPont & Pioneer direct Monsanto to the blackline version of the SAAC comparing it to the First Amended Answer and Counterclaims, which they provided to Monsanto ten months ago, in February 2010.

Moreover, Monsanto plainly anticipated producing documents related to germplasm developers. Monsanto agreed to search its document collection using the following search terms:

- (Syngenta /p settle!) /50 ("Roundup Ready" or RR or "Roundup Ready 2 Yield" or RR2! or 40-3-2 or OGAT or "Optimum GAT" or "O-GAT")
- germplasm /40 (licens! or breed!) /40 (Roundup Ready 2 Yield or RR2! or Roundup or RR or 40*3*2)[1]
- (destroy! or destruct!) /p ("biological material" or seed or breed! or germplasm or variet!) /25 ("Roundup Ready" or RR or 40*3*2)
- (out-license or outlicense) /20 germplasm
- "market share" and ("Roundup Ready" or RR or "Roundup Ready 2 Yield" or RR2! or "herbicide toleran!" or "insect resist!" or germplasm)
- Generic /p (soy or Roundup Ready or RR!) share /5 (corn or soy or trait! or germplasm)
- Compet! /20 (trait! or seed! or grain! or germplasm or RR or RR1 or "Roundup Ready" or patent!)

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1 DuPont & Pioneer note that the list of "Final Monsanto Search Terms" you forwarded to us on October 19, 2010 shows the first two search terms on this list as a single, syntactically incorrect search term: "(Syngenta /p settle!) /50 ("Roundup Ready" or RR or "Roundup Ready 2 Yield" or RR2! or 40-3-2 or OGAT or "Optimum GAT" or "O-GAT")germplasm /40 (licens! or breed!) /40 (Roundup Ready 2 Yield or RR2! or Roundup or RR or 40*3*2)." Monsanto agreed to run these search terms separately, and DuPont & Pioneer request that Monsanto do so, and produce any resulting documents as part of supplementing its production. *See* 6/3/2010 Email from J. Rosenthal to A. Mauser.

- "Corn States" /5 germplasm /20 (RR or RR1 or "Roundup Ready" or RR2 or "Roundup Ready 2 Yield")
- ("HCS" or "Holdens" or "Holden's") /10 germplasm /20 (soy! or Roundup Ready" or RR or RR2!)

These search terms and others demonstrate that Monsanto understood the SAAC incorporated allegations that would require production of documents concerning germplasm developers. Indeed, though Monsanto reserved its objection to the relevance of documents having to do with its settlement with Syngenta, Monsanto never objected to producing documents related to its licensing arrangements concerning germplasm or germplasm developers, and it has therefore waived the right to make any such objection now.

The allegations and search terms reproduced above make perfectly clear what DuPont & Pioneer argued in seeking leave to amend – that "Monsanto's treatment of germplasm developers is an important component – one among many – of Monsanto's switching strategy." (Br. to Amend at 6.) That being the case, DuPont & Pioneer are entitled to document discovery concerning these allegations. *See* Fed. R. Civ. P. 26(b)(1); Fed. R. Civ. P. 34. Indeed, the Court has already entered two orders directing the parties "to proceed with discovery on the full scope of their 'switching strategy' allegations" over Monsanto's objections. *Monsanto Co. v. E.I. du Pont de Nemours*, No. 09-civ-0686, 2010 WL 3039210, *12 (E.D. Mo. July 30, 2010); *see also Monsanto Co. v. E.I. du Pont de Nemours*, No. 09-civ-0686, 2009 WL 3012584, *3 (E.D. Mo. Sept. 16, 2009). Monsanto's late-adopted position that DuPont & Pioneer cannot obtain document discovery concerning allegations related to germplasm developers cannot be reconciled with the basic facts of the case, the orders of the Court, and the rules of civil procedure; Monsanto's position also calls into question its good faith in responding to other document requests.

Accordingly, we request that Monsanto withdraw its objection immediately, and provide DuPont & Pioneer assurances no later than Friday, December 17 that it will produce the requested documents identified in this letter, our December 3, 2010 letter, as well as Defendants' Second Set of Requests for Production of Documents, Requests No. 4 and 5. To be clear, DuPont & Pioneer have requested all Monsanto's Roundup Ready and Roundup Ready 2 Yield license agreements with Syngenta, Dow, and any other germplasm developer, as well as all documents concerning such licenses and relationships, including without limitation documents concerning the negotiation of such licenses and Monsanto's strategic documents related to licenses. Please let us know whether Monsanto will agree to promptly produce all such documents.

Sincerely,

Amy J. Mauser

cc: George C. Lombardi, Esq.
Gail J. Standish, Esq.
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